



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
1315 East-West Highway
Silver Spring, Maryland 20910
THE DIRECTOR

JUN 28 2004

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Ms. Deborah Streeter
National Ocean Service
Chair, Sanctuary Advisory Council
Monterey Bay National Marine Sanctuary
299 Foam Street
Monterey, California 93940

Dear Ms. Streeter:

Thank you for your letter regarding Donna Wieting's briefing on the National Defense Authorization Act (NDAA) amendments to the Marine Mammal Protection Act (MMPA) and Endangered Species Act (ESA). I will address the questions and concerns you outlined in your letter below.

Exemptions

We are aware of the confusion surrounding the nature of the "exemptions" under the NDAA amendment to the MMPA's harassment definition. For instance, the NDAA harassment definition is not an "exemption" for the Department of Defense (DOD) from the MMPA's harassment standard, as some have described it. Rather, the NDAA provides a different harassment definition for "military readiness activities" and certain scientific research activities conducted by or on behalf of the Federal government. NOAA Fisheries is currently preparing guidance to interpret the NDAA amendment to the harassment definition. Once we have completed the guidance, we will educate the public and potential applicants regarding its implementation.

The NDAA does, however, add an exemption process to the MMPA for DOD during times of heightened national security. There is a specific process for DOD to use the exemption. Specifically, DOD must first make a determination that an exemption is necessary and confer with the Secretaries of Commerce and the Interior. Each exemption is effective for a maximum of two years. DOD must also submit notice to the Armed Services Committees in the U.S. House of Representatives and U.S. Senate describing and justifying the exemption.

Incidental Take Authorizations under the MMPA

The MMPA, unlike the ESA, does not contain a formal consultation requirement. However, DOD and others are required under the MMPA to seek authorization from NOAA Fisheries before conducting an activity that will result in the "harassment" or other taking of a marine mammal or marine mammal stock. Whether or not DOD must seek authorization for a particular activity depends on the nature of the activity and its effect on a marine mammal or marine mammal stock. For "military readiness activities" (and certain scientific research activities conducted by or on behalf of the Federal government), the NDAA changed the definition of harassment under the MMPA to provide:

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FOR FISHERIES



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In the case of a military readiness activity...the term 'harassment' means—

(i) any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild [Level A]; or

(ii) any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered [Level B].

For activities that fall outside the NDAA amendment, the original harassment definition for Level A and B harassment applies, as follows:

The term "harassment" means any act of pursuit, torment, or annoyance which—

(i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A]; or

(ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B].

Enforcement

NOAA Fisheries is responsible for implementing the MMPA for cetaceans, seals, and sea lions, including enforcement of provisions prohibiting harassment and other takings of these marine mammals by the military or anyone else. The U.S. Fish and Wildlife Service (USFWS) in the Department of Interior (DOI) is responsible for implementing the MMPA, including enforcement, for all other types of marine mammals, including sea otters, walrus, manatees, and polar bears.

Acoustics Research by the Military

DOD will continue to be required to seek authorization or permits for activities, including acoustics research activities, that will result in Level A or Level B "harassment," as defined. Authorizations for research that results in incidental, but not intentional, harassment will be provided under section 101(a)(5) of the MMPA if, among other things, the research is found to have a negligible impact on marine mammals. Permits for acoustic research on marine mammals will be processed and issued under section 104(c).

Sea Otters

As previously noted, the USFWS in the DOI is responsible for implementing the MMPA for sea otters. While USFWS has primary responsibility for monitoring and addressing military impacts on sea otters, we work closely with them, for instance, by coordinating with them on analyses under the National Environmental Policy Act. We recommend you contact Marty Kodis at the USFWS at (703) 358-2183 for further information regarding the appropriate contacts for information on sea otters.

We appreciate your interest in marine mammal and endangered species issues and welcome continued discussion on any of the above topics. Please contact Donna Wieting of the Office of Protected Resources at (301) 713-2332 if you have any further questions.

Sincerely,

A handwritten signature in black ink, appearing to read "W. T. Hogarth".

William T. Hogarth, Ph.D.
Assistant Administrator
for Fisheries